

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

12 SEBASTIAN BROWN PRODUCTIONS,  
13 LLC,  
14 Plaintiff,  
15 v.  
16 MUZOOKA, INC., et al.,  
17 Defendants.

Case No. 15-CV-01720-LHK

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS**

Re: Dkt. No. 37

18 Plaintiff Sebastian Brown Productions, LLC (“Plaintiff”) sued Defendants Muzooka, Inc.  
19 (“Muzooka”), Shawn Wilson (“Wilson”), Chester Aldridge (“Aldridge”) and Ivory Octaves, LLC  
20 (“Ivory Octaves”) (collectively, “Defendants”) for unfair competition and trademark infringement  
21 under federal and state law. ECF No. 1 (“Compl.”). Before the Court is Defendants’ motion to  
22 dismiss. ECF No. 37. Having considered the submissions of the parties, the relevant law, and the  
23 record in this case, the Court hereby GRANTS in part and DENIES in part Defendants’ motion to  
24 dismiss.

**I. BACKGROUND****A. Factual Background****1. Plaintiff's Business**

Plaintiff is a California limited liability company headquartered in Livermore, California. Compl. ¶ 1. Plaintiff owns and operates the digital media storefront MuZook at muzook.com. *Id.* Plaintiff aims to create “a new and unique art form in multi-media books, multi-media audio, and/or audiovisual works,” including ebooks, multi-media songs, short films, and music videos. *Id.* ¶ 13. Through muzook.com, Plaintiff advertises and sells downloadable music, videos, and books, including works of fiction and non-fiction incorporating “narrative textual content, music, and illustrations.” *Id.* ¶¶ 14, 21. Additionally, muzook.com has “an artists’ collaboration program . . . to promote cooperation among various creative artists” in making “literature, music, video, movies, soundtracks, e-books, concerts and other forms of entertainment.” *Id.* ¶¶ 12, 15.

Plaintiff claims ownership of the service mark “MUZOOK,” based on one pending trademark application and one issued trademark registration. *Id.* ¶ 16. Both properties stem from a common intent-to-use (“ITU”) application for “MUZOOK” filed on September 12, 2011 by the individual J. Michael Miller (“Miller”). *Id.*; ECF No. 47 (Defendants’ Request for Judicial Notice, or “RJN”), Exs. A-B. The ITU application sought to register “MUZOOK” for, among other similar services, “[c]ollaboration tools and services, namely telecommunication access services allowing parties to view, listen to, adapt, and share materials.” RJN Ex. A.

On August 30, 2013, the U.S. Patent and Trademark Office (“PTO”) granted a request to divide the ITU application into a “parent” application, serial number 85420834, and a “child” application, serial number 85980000. *Id.* Exs. A-B. The parent application encompasses the original ITU application, and thus seeks to register “MUZOOK” for a range of similar “[c]ollaboration tools and services.” *Id.* Ex. A. By contrast, the child application seeks to register “MUZOOK” for narrower services, including “[c]ollaboration services, namely, telecommunication access services which allow parties to view, adapt, and share materials such as narrative textual content, music and illustrations in works of fiction and non-fiction.” *Id.* Ex. B.

1 Miller filed a statement of use in the child application, which the PTO accepted on  
2 September 11, 2013. *Id.* Accordingly, the PTO issued U.S. Trademark Registration Number  
3 4,419,977 for “MUZOOK” for the services claimed in the child application on October 15, 2013  
4 (the “Registered Mark”). The first use in commerce of the Registered Mark was recorded as of  
5 August 14, 2013. *Id.* Miller has not assigned the Registered Mark and remains its owner. *Id.*

6 On the other hand, Miller assigned the interest in the parent application to Plaintiff on  
7 November 25, 2013. *Id.* Ex. A. Plaintiff has not filed a statement of use for the parent  
8 application, and thus the parent application remains pending (the “Pending Mark”). *Id.* The PTO  
9 has granted five extensions of time for Plaintiff to file a statement of use. *Id.* However, Plaintiff  
10 has allegedly used the Pending Mark—along with the Registered Mark—in connection with  
11 Plaintiff’s Internet presence and business promotions. Compl. ¶ 18.

12 **2. Defendant’s Business**

13 Defendant Muzooka is a Delaware corporation and the successor to Ivory Octaves.  
14 Compl. ¶¶ 2-3. Defendants Wilson and Aldridge are cofounders, directors, and officers of  
15 Muzooka. *Id.* ¶¶ 4-5. Defendants operate the website muzooka.com as well as a dedicated mobile  
16 app called Muzooka. *Id.* ¶¶ 2, 24. The website and mobile app allow users to stream audio in the  
17 form of music playlists or individual tracks, and offer “interactive capabilities” for sharing  
18 listening activity through social media. *Id.* ¶ 24. The website and app also allow users to browse  
19 artist biographies, view art in connection with those biographies, and purchase select tracks. *Id.*  
20 Additionally, Defendants operate “Muzooka” Twitter, Facebook, and Tumbler accounts in  
21 connection with the website and mobile app. *Id.*

22 Muzooka filed for the trademark and service mark “MUZOOKA” (the “Muzooka Mark”)  
23 on December 19, 2011. ECF No. 46-1, Ex. D.<sup>1</sup> Muzooka first used the Muzooka Mark in  
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26 <sup>1</sup> Defendants do not include the Muzooka Mark registration in their request for judicial notice, *see*  
27 ECF No. 47, but attach a copy to their reply brief, ECF No. 46-1 Ex. D. The registration is a  
matter of public record, and “[i]n deciding whether to dismiss a claim under Fed. R. Civ. P.  
12(b)(6), a court may look beyond the plaintiff’s complaint to matters of public record.” *See Shaw*  
28 *v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).

1 commerce in December 2011. *Id.* The PTO registered the Muzooka Mark on December 10, 2013,  
2 as U.S. Trademark Registration Number 4,448,314. *Id.* The Muzooka Mark is registered for,  
3 among other services, “computer software for use in the delivery, distribution and transmission of  
4 digital music and entertainment-related audio, video, text and multimedia content.” *Id.*

5 **B. Procedural History**

6 On January 6, 2014, Plaintiff filed this suit in the U.S. District Court for the District of  
7 Delaware. ECF No. 1. In the complaint, Plaintiff alleges that Defendants have used the Muzooka  
8 Mark in direct competition with Plaintiff since at least March 11, 2013. *Id.* ¶¶ 25, 30. According  
9 to Plaintiff, Defendants’ use of the Muzooka Mark in connection with “the distribution of  
10 electronically-delivered media, including audio, visual, and audiovisual works” and the offering of  
11 “new music and interactive experiences to users” is “likely to cause confusion or mistake or to  
12 deceive purchasers as to the source of origin of Defendants’ products and services.” *Id.* ¶¶ 30, 33.  
13 On that basis, Plaintiff asserts three causes of action: (1) unfair competition; (2) infringement of  
14 common-law trademark rights; and (3) unfair competition under the Lanham Act, 15 U.S.C.  
15 § 1125(a). *Id.* ¶¶ 39-54. Plaintiff seeks damages and the disgorgement of profits, as well as an  
16 order enjoining Defendants’ use of the Muzooka Mark and requiring the destruction of materials  
17 bearing the Muzooka Mark. *Id.* at 12-13.

18 Plaintiff filed an executed summons for Muzooka on January 8, 2014. ECF No. 5.  
19 Plaintiff filed executed summonses for the remaining defendants on February 25, 2014. ECF Nos.  
20 6-8. On June 5, 2015, after no appearance by Defendants, Plaintiff moved for entry of default.  
21 ECF No. 10. On June 6, 2014, the Delaware district court entered default as to all defendants.  
22 ECF No. 11. The parties then stipulated to set aside the entry of default, which the Delaware  
23 district court granted on June 11, 2014. ECF No. 12. On March 30, 2015, the Delaware district  
24 court concluded that it lacked personal jurisdiction over the individual defendants and transferred  
25 the case to the U.S. District Court for the Northern District of California. ECF No. 27.

26 On April 16, 2015, the Court issued a case management scheduling order. ECF No. 29.  
27 On July 6, 2015, Defendants Muzooka, Aldridge, and Wilson filed the instant motion to dismiss.

1 ECF No. 37 (“Mot.”). Plaintiff opposed the motion on July 20, 2015. ECF No. 45 (“Opp.”). On  
2 July 27, 2015, the three defendants replied and filed a request for judicial notice. ECF No. 46;  
3 RJD.

4 **II. LEGAL STANDARD**

5 **A. Rule 12(b)(6) Motion to Dismiss**

6 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a  
7 short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint  
8 that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). Rule 8(a) requires a  
9 plaintiff to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*  
10 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff  
11 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
12 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility  
13 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a  
14 defendant has acted unlawfully.” *Id.*

15 For purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations  
16 in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving  
17 party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The  
18 Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see*  
19 *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it “may look beyond the plaintiff’s  
20 complaint to matters of public record” without converting the Rule 12(b)(6) motion into a motion  
21 for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor must the  
22 Court “assume the truth of legal conclusions merely because they are cast in the form of factual  
23 allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam). Mere  
24 “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to  
25 dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

26 **B. Rule 12(b)(5) Service of Process**

27 “Before a federal court may exercise personal jurisdiction over a defendant, the procedural

1 requirement of service of summons must be satisfied.” *Omni Capital Int’l v. Rudolf Wolff & Co.*,  
2 484 U.S. 97, 104 (1987); *see also Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 350  
3 (1999) (“In the absence of service of process (or waiver of service by the defendant), a court  
4 ordinarily may not exercise power over a party the complaint names as defendant.”). “Once  
5 service is challenged, plaintiffs bear the burden of establishing that service was valid under Rule  
6 4.” *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004) (citing 4A Charles A. Wright & Arthur  
7 R. Miller, *Federal Practice and Procedure* § 1083 (3d ed. 2002 & Supp. 2003)). “[N]either actual  
8 notice, nor simply naming the person in the caption of the complaint, will subject defendants to  
9 personal jurisdiction if service was not made in substantial compliance with Rule 4.” *Crowley v.*  
10 *Bannister*, 734 F.3d 967, 975 (9th Cir. 2013) (brackets omitted).

11 Federal Rule of Civil Procedure 4(e) governs service of individuals within a judicial  
12 district of the United States. Fed. R. Civ. P. 4(e). Pursuant to that rule, service may be effectuated  
13 by “following state law for servicing a summons in an action brought in courts of general  
14 jurisdiction where the district court is located or where service is made.” *Id.* Rule 4(e) permits  
15 three additional methods of service: (1) delivering copies of the summons and complaint to the  
16 individual personally; (2) leaving copies of the summons and complaint at the individual’s  
17 dwelling; and (3) delivering copies of the summons and complaint to an agent authorized to  
18 receive service. *Id.*

19 **C. Leave to Amend**

20 If the court concludes that the complaint should be dismissed, it must then decide whether  
21 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to  
22 amend “shall be freely given when justice so requires,” bearing in mind “the underlying purpose  
23 of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or  
24 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (citation omitted).  
25 Nonetheless, a district court may deny leave to amend a complaint due to “undue delay, bad faith  
26 or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments  
27 previously allowed, undue prejudice to the opposing party by virtue of allowance of the

1 amendment, [and] futility of amendment.” *See Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d  
2 522, 532 (9th Cir. 2008).

### 3 **III. DISCUSSION**

4 Defendants contend that Ivory Octaves must be dismissed because Ivory Octaves does not  
5 exist. Defendants also contend that Wilson and Aldridge must be dismissed because of  
6 insufficient service of process. Defendants further contend that the complaint should be dismissed  
7 as to all defendants for failure to state a claim. The Court addresses these arguments in turn.

#### 8 **A. Ivory Octaves**

9 Defendants argue that no plausible claim for relief can be stated against Ivory Octaves  
10 because the company is no longer in operation. Mot. at 7. In the complaint, Plaintiff  
11 acknowledges that Ivory Octaves “filed a certificate of conversion and incorporation with the  
12 Delaware Secretary of State and become Muzooka, Inc. as of January 1, 2013.” Compl. ¶ 3. In  
13 the opposition, Plaintiff abandons any claim against Ivory Octaves as a separate entity, and notes  
14 that “Ivory Octaves, LLC and Muzooka are one and the same.” Opp. at 10. Accordingly, the  
15 Court GRANTS Defendants’ motion to dismiss all claims against Ivory Octaves with prejudice.

#### 16 **B. Service of Process**

17 On January 6, 2014, Plaintiff filed this suit in the U.S. District Court for the District of  
18 Delaware. ECF No. 1. Under the Federal Rules of Civil Procedure, Plaintiff then had 120 days,  
19 or until May 6, 2014, to serve Defendants. *See Fed. R. Civ. P. 4(m)*. According to Defendants,  
20 Plaintiff has not yet properly served Wilson or Aldridge. Mot. at 8. Defendants do not dispute  
21 that Muzooka was properly served.

22 Plaintiff counters that Wilson and Aldridge were served on February 25, 2014. ECF No. 6,  
23 8. Specifically, Plaintiff contends that Plaintiff “deliver[ed] a copy of [the summons and the  
24 complaint] to an agent authorized by appointment or by law to receive service of process” for  
25 Wilson and Aldridge. *See Fed. R. Civ. P. 4(e)(2)(C)*. Plaintiff relies on the executed summonses  
26 for Wilson and Aldridge filed with the Court. ECF Nos. 6, 8. Each summons provides that the  
27 summons was served on “Stewart Permar, the UPS Store, who is designated by law to accept

1 service of process *on behalf of Muzooka, Inc.*” ECF Nos. 6, 8 (emphasis added). However, these  
 2 summonses plainly fail to comply with Rule 4(e)(2)(C). Nowhere do the summonses—or any  
 3 other allegations by Plaintiff—indicate that Permar was authorized to accept service for Wilson or  
 4 Aldridge. *See* ECF Nos. 6, 8;<sup>2</sup> *see also Brockmeyer*, 383 F.3d at 801 (noting plaintiff bears the  
 5 burden of establishing proper service).

6 Rather than defend the summonses’ compliance with Rule 4, Plaintiff argues that the Court  
 7 should excuse the delay and set a date for proper service.<sup>3</sup> Opp. at 11-12. The Court “must extend  
 8 time for service upon a showing of good cause” by Plaintiff. *Crowley*, 734 F.3d at 976. In the  
 9 Ninth Circuit, “[a]t a minimum, ‘good cause’ means excusable neglect.” *In re Sheehan*, 253 F.3d  
 10 507, 512 (9th Cir. 2001). Additionally, “a plaintiff may be required to show the following factors  
 11 in order to bring the excuse to the level of good cause: ‘(a) the party to be served received actual  
 12 notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be  
 13 severely prejudiced if his complaint were dismissed.’” *Id.* (quoting *Boudette v. Barnette*, 923 F.2d  
 14 754, 756 (9th Cir. 1991)). Further, “[a] defendant’s affirmative actions, which frustrate service,  
 15 may constitute good cause for failure to effect timely service . . . .” *Hearst v. West*, 31 Fed. App’x  
 16 366, 368 (9th Cir. 2002).

17 The first two factors that courts may consider in evaluating good cause are clearly met in  
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19 <sup>2</sup> The Court does not rely on Wilson’s and Aldridge’s declarations, submitted only in support of  
 20 Defendants’ first motion to dismiss in the U.S. District Court for the District of Delaware, that  
 21 neither of them authorized Permar to accept service. *See* Mot. at 2 (citing Wilson and Aldridge  
 22 declarations). This Court may not “look beyond the plaintiff’s complaint” to matters outside the  
 23 pleadings, unless the Court refers to judicially noticeable facts or matters of public record. *Shaw*,  
 24 56 F.3d at 1129 n. 1; *Shwarz*, 234 F.3d at 435. Defendants did not request judicial notice of these  
 25 declarations, nor do Defendants argue that the declarations are matters of public record. *See* Mot.  
 26 at 2. Accordingly, it is improper for this Court to consider the declarations of Wilson and  
 27 Aldridge in ruling on Defendants’ motion to dismiss.

28 <sup>3</sup> On October 8, 2015, Plaintiff filed two additional summonses with the Court, one each for  
 29 Wilson and Aldridge. ECF Nos. 53-54. The new summonses indicate that Plaintiff left a copy of  
 30 the summons, complaint, and additional Court filings with an associate at the law firm  
 31 representing Defendants. ECF Nos. 53-54. It is not clear whether Wilson or Aldridge authorized  
 32 this associate to accept service on their behalves. Plaintiff does not point to any provision of Rule  
 33 4, or to Delaware or California state law, that permits service in this manner. Accordingly, this  
 34 Order expresses no opinion on whether Wilson and Aldridge have been properly served as of the  
 35 time of this Order.

1 this case. First, Wilson and Aldridge have long had actual notice of the lawsuit. Second,  
2 Defendants do not argue that any prejudice would result from permitting service. Both individuals  
3 joined the June 10, 2014 stipulation to set aside the entry of default in the U.S. District Court for  
4 the District of Delaware. ECF No. 12. That stipulation states that the parties, including Wilson  
5 and Aldridge, began settlement discussions on February 12, 2014. *Id.* Additionally, Wilson and  
6 Aldridge have actively litigated the case by filing a motion to transfer venue and multiple motions  
7 to dismiss, including the instant motion to dismiss. *See* ECF Nos. 13, 37; *see also* *Cox v. Cnty. of*  
8 *Yuba*, No. 2:09-CV-01894-MCE-JFM, 2011 WL 590733, at \*6 (E.D. Cal. Feb. 10, 2011) (noting  
9 lack of prejudice when the delay in service does not impact the defendants' ability to adequately  
10 defend their positions).

11 However, the third good-cause factor is not met. Plaintiff does not assert that Plaintiff will  
12 suffer any prejudice from dismissal of this action, let alone be "severely prejudiced." *See In re*  
13 *Sheehan*, 253 F.3d at 512. Moreover, Plaintiff offers no reason to excuse Plaintiff's facially  
14 improper service. *See id.* (noting good cause requires "excusable neglect" (emphasis added)).  
15 Plaintiff does not explain why Plaintiff was able to engage in discussions with Defendants'  
16 counsel and yet unable to serve Wilson and Aldridge. *See Joe Hand Promotions, Inc. v. McInnis*,  
17 No. 10-CV-01614-LHK, 2010 WL 3366413, at \*1 (N.D. Cal. Aug. 25, 2010) (finding no good  
18 cause shown when the plaintiff fails to explain why the plaintiff could serve defendants with a  
19 Clerk's notice but not the summons and complaint). Although Plaintiff claims that Defendants'  
20 counsel refused to provide Wilson's and Aldridge's addresses to Plaintiff, Plaintiff did not request  
21 those addresses until July 6, 2015—two months after the deadline for service under Rule 4(m).  
22 *See* ECF No. 45-1 (Declaration of Anthony H. Handal). Thus, Plaintiff has failed to establish  
23 good cause.

24 Absent good cause, courts have discretion "to extend the time for service or to dismiss the  
25 action without prejudice." *In re Sheehan*, 253 F.3d at 513. The Ninth Circuit has not set forth  
26 specific factors to consider in making discretionary determinations under Rule 4(m). *Id.*  
27 However, the Ninth Circuit has noted that "a district court may consider factors like a statute of  
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1 limitations bar, prejudice to the defendant, actual notice of a lawsuit, and eventual service.” *Efaw*  
2 *v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007). Courts may also consider whether the plaintiff  
3 has substantially complied with the service requirements. *Joe Hand Promotions, Inc.*, 2010 WL  
4 3366413, at \*1.

5 Although Plaintiff has not established good cause, the Court exercises its discretion to  
6 grant an extension of the time for service. As noted, Wilson and Aldridge have actual notice of  
7 the lawsuit, and have had such notice since at least February 2014. *See* ECF No. 12. Defendants  
8 claim no prejudice from the delay. *See generally* Mot. at 8. Moreover, Plaintiffs have attempted  
9 service on Wilson and Aldridge. *See* ECF Nos. 6, 8. Additionally, there is no dispute that  
10 Muzooka was properly served. Plaintiff asserts the same claims against Muzooka, Wilson, and  
11 Aldridge; thus, adjudicating the claims together will promote judicial efficiency. Therefore, the  
12 Court finds that an extension of service will best serve the interests of the “just, speedy and  
13 efficient disposition” of Plaintiff’s claims. *See Full Circle Sales, Inc. v. Organic Alliance, Inc.*,  
14 No. 10-CV-01615-LHK, 2010 WL 3324707, at \*1 (N.D. Cal. Aug. 20, 2010) (granting extension  
15 of time for service when one defendant had actual notice and settlement discussions were  
16 ongoing). Accordingly, the Court DENIES Defendants’ motion to dismiss Wilson and Aldridge  
17 for insufficient service of process and hereby ORDERS Plaintiff to properly serve Wilson and  
18 Aldridge within thirty (30) days of this Order. Service should include the summons, complaint,  
19 initial case management order, and any supplemental filings required by Civil Local Rule 4-2. No  
20 further extensions shall be granted.

21 **C. Failure to state a claim**

22 Defendants offer two reasons to dismiss the complaint for failure to state a claim: (1) the  
23 complaint impermissibly lumps all the defendants together such that no defendant is on notice of  
24 the claims against it; and (2) Plaintiff fails to sufficiently plead a violation of federal or state law.  
25 The Court addresses these arguments in turn.

26 **1. Impermissible Lumping of Defendants**

27 Defendants argue that the complaint “fails to provide fair notice to Defendants of the

1 claims being asserted against them as the Complaint merely alleges wrongdoing against  
2 ‘Defendants’ without specifying which Defendant may have committed the act. Each Defendant  
3 is entitled to know the specific acts or omissions which it must defend.” Mot. at 4 (citation  
4 omitted). Defendants further argue that the complaint attributes the conduct of “Defendants” to  
5 Wilson and Aldridge “without providing any reason or basis for lumping Defendants together or  
6 specifying individual wrongful conduct,” or offering any allegations “to support piercing the  
7 corporate veil of Muzooka.” *Id.* at 5. Plaintiffs counter that Wilson and Aldridge share liability  
8 for Muzooka’s trademark infringement because Wilson and Aldridge had control of Muzooka and  
9 “infringed or induced infringement” of Plaintiff’s trademark. Opp. at 9-10.

10 As a general rule, when a pleading fails “to allege what role each Defendant played in the  
11 alleged harm,” this “makes it exceedingly difficult, if not impossible, for individual Defendants to  
12 respond to Plaintiffs’ allegations.” *Adobe Sys. Inc. v. Blue Source Grp., Inc.*, No. 14-CV-02147-  
13 LHK, 2015 WL 5118509, at \*10 (N.D. Cal. Aug. 31, 2015) (quoting *In re iPhone Application*  
14 *Litig.*, No. 11-MD-02250-LHK, 2011 WL 4403963, at \*8 (N.D. Cal. Sept. 20, 2011)).  
15 Accordingly, a complaint which “lump[s] together . . . multiple defendants in one broad allegation  
16 fails to satisfy [the] notice requirement of Rule 8(a)(2).” *Gen-Probe, Inc. v. Amoco Corp., Inc.*,  
17 926 F. Supp. 948, 961 (S.D. Cal. 1996) (citing *Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071  
18 (N.D. Cal. 1988)). A plaintiff “must identify what action each Defendant took that caused  
19 Plaintiffs’ harm, without resort to generalized allegations against Defendants as a whole.” *In re*  
20 *iPhone*, 2011 WL 4403963, at \*3. Put another way, a plaintiff’s allegations must “provide  
21 sufficient notice to all of the Defendants as to the nature of the claims being asserted against  
22 them,” including “what conduct is at issue.” *Villalpando v. Exel Direct Inc.*, No. 12-CV-04137  
23 JCS, 2014 WL 1338297, at \*5 (N.D. Cal. Mar. 28, 2014).

24 Construing the pleadings in the light most favorable to Plaintiff—as the Court must in  
25 ruling on a motion to dismiss, *see Manzarek*, 519 F.3d at 1031—the Court finds that the complaint  
26 does not impermissibly lump Defendants together in stating claims for direct infringement and  
27 unfair competition. Viewed favorably, Plaintiff alleges that Wilson and Aldridge, while directors

1 and officers of Muzooka, committed the acts of infringement described in the complaint. Compl.  
2 ¶¶ 4-5. In other words, the complaint alleges that “Defendants”—including Wilson, Aldridge, and  
3 Muzooka—used the allegedly infringing Muzooka Mark, including by operating muzooka.com  
4 and the Muzooka Twitter, Facebook, and Tumbler accounts. *Id.* ¶¶ 24-31. The Court finds that  
5 such allegations “provide [Muzooka, Wilson, and Aldridge] sufficient notice as to the nature of the  
6 claims asserted,” including “what conduct is at issue.” *See Villalpando*, 2014 WL 1338297, at \*5.  
7 *Compare Adobe Sys. Inc.*, 2015 WL 5118509, at \*10 (finding complaint provided sufficient notice  
8 when allegations were “that all the Defendants infringed Adobe’s trademarks and copyrights, and  
9 that Blue Source specifically sold infringing products”), *with Gen-Probe*, 926 F. Supp. at 960  
10 (finding complaint did not provide sufficient notice when it was unclear which claims applied to  
11 which defendants).

12 Moreover, Wilson and Aldridge may be held liable for acts of trademark infringement that  
13 they committed, even if the infringement was for the benefit of Muzooka. *See Comm. for Idaho’s*  
14 *High Desert, Inc. v. Yost*, 92 F.3d 814, 823-24 (9th Cir. 1996) (finding that individuals that formed  
15 a corporation with an infringing name were liable under the Lanham Act for using in commerce a  
16 name which is likely to confuse). “[A] corporate officer or director is, in general, personally liable  
17 for all torts which he authorizes or directs or in which he participates, notwithstanding that he  
18 acted as an agent of the corporation and not on his own behalf.” *Id.* (quoting *Transgo, Inc. v. Ajax*  
19 *Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir. 1985)); *see also Coastal Abstract Serv.,*  
20 *Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999) (finding corporate officer liable  
21 for making an actionable statement under the Lanham Act); *Polo Fashions, Inc. v. Craftex, Inc.*,  
22 816 F.2d 145, 149 (4th Cir. 1987) (“A corporate official may be held personally liable for tortious  
23 conduct committed by him, though committed primarily for the benefit of the corporation. This is  
24 true in trademark infringement and unfair trade practices cases.”). Accordingly, the Court declines  
25 to dismiss the complaint on the grounds that Plaintiff improperly lumps the defendants together in  
26 the allegations about Defendants’ infringement of Plaintiff’s trademark rights.

27 While the Court finds the complaint itself does not impermissibly lump Defendants  
28

1 together, Plaintiff's opposition to the motion to dismiss does impermissibly lump Defendants  
2 together. In response to Defendants' argument, Plaintiff asserts that Wilson and Aldridge share  
3 liability with Muzooka because each defendant committed acts of infringement *and* because  
4 Wilson and Aldridge have contributory or vicarious liability for inducing infringement of  
5 Plaintiff's trademark. Opp. at 9-10. However, the claims for relief do not differentiate between  
6 inducers (Wilson and Aldridge) and non-inducers (presumably, Muzooka). *See* Compl. ¶¶ 39-54.  
7 In fact, the claims for relief do not refer to inducement at all. *See id.* (noting "Defendants have  
8 *used*, in connection with goods and/or services, a false designation of origin . . ." (emphasis  
9 added)). Moreover, there are no factual allegations about inducement in the complaint, save for  
10 the conclusory allegation that Wilson and Aldridge "personally committed and/or induced the  
11 commission of acts of infringement." *See id.* ¶¶ 4-5. Instead, the factual allegations—like the  
12 claims for relief—allege only acts of direct infringement of Plaintiff's trademark rights. *See id.*  
13 ¶¶ 24-31. Accordingly, if Plaintiff does intend to state a claim for secondary liability, Plaintiff  
14 impermissibly lumps Defendants together. *See Gen-Probe*, 926 F. Supp. at 960 (finding  
15 complaint did not provide sufficient notice when it was unclear which claims applied to which  
16 defendants).

17 Consequently, the Court GRANTS Defendants' motion to dismiss to the extent that the  
18 complaint states a claim for inducing infringement of Plaintiff's trademark rights. The Court  
19 dismisses with leave to amend, as Plaintiff could cure the deficiencies identified herein by  
20 including some factual specificity as to whether any inducement claims apply to particular  
21 defendants. *See Lopez*, 203 F.3d at 1130 (district court should give leave to amend if the pleading  
22 can be cured by the allegation of other facts). The Court otherwise DENIES Defendants' motion  
23 to dismiss as to impermissibly lumping defendants together.

24 **2. Sufficiency of the Allegations**

25 Defendants also move to dismiss Plaintiffs' claims for failure to state a claim for relief.  
26 Mot. at 5-7. In the briefing on this motion, both parties focus on Plaintiff's claims for common  
27 law trademark infringement and Lanham Act unfair competition. Neither party separately

1 addresses Plaintiff's claim for state law unfair competition. *See generally id.*; Opp. Accordingly,  
2 the Court first addresses Plaintiff's claims for common law trademark infringement and Lanham  
3 Act unfair competition, and then turns to Plaintiff's state law claim for unfair competition.

4 **a. Common Law Trademark Infringement and Lanham Act Unfair Competition**

5 **i. Elements of the Causes of Action**

6 Plaintiff asserts common law trademark infringement and Lanham Act unfair competition  
7 claims against all Defendants. Both of these claims require Plaintiff to allege: (1) ownership  
8 interest in a mark, and (2) the likelihood of the infringing mark being confused with the plaintiff's  
9 mark. *See Wood v. Apodaca*, 375 F. Supp. 2d 942, 947-48 (N.D. Cal. 2005) (California common  
10 law) (citing *Am. Petrofina v. Petrofina of Cal., Inc.*, 596 F.2d 896, 897 (9th Cir. 1979); *Brookfield*  
11 *Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999) (unfair  
12 competition under the Lanham Act)). An ownership interest is demonstrated through priority of  
13 use. *See Wood*, 375 F. Supp. 2d at 948 (citing *Am. Petrofina*, 596 F.2d at 897 ("[W]hosoever first  
14 adopts and uses a trade name, either within or without the state, is its original owner.")); *Sengoku*  
15 *Works Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996) ("It is axiomatic in trademark  
16 law that the standard test of ownership is priority of use.").

17 Defendants argue that Plaintiff fails to plead either element of common law trademark  
18 infringement or Lanham Act unfair competition. According to Defendants, (1) Plaintiff lacks an  
19 ownership interest in "MUZOOK" because Defendants have priority of use, and (2) Plaintiff fails  
20 to sufficiently allege a likelihood of confusion between "MUZOOK" and Defendants' Muzooka  
21 Mark. Mot. at 5-7. Because the Court concludes that Plaintiff has not alleged a protectable  
22 ownership interest, the Court need not address the sufficiency of Plaintiff's likelihood of  
23 confusion allegations.

24 **ii. Ownership of a Mark**

25 Defendants contend that Plaintiff lacks an ownership interest in "MUZOOK" because  
26 Plaintiff does not establish use of the Registered or Pending Marks prior to December 2011, when  
27 Defendants first used the Muzooka Mark in commerce. Mot. at 7. Plaintiff only cursorily  
28

1 responds to this argument. *See* Opp at 10-11. However, Plaintiff may seek to claim priority of use  
2 on two grounds: (1) Plaintiff owns the Registered and Pending Marks, and thus has priority of use  
3 dating back to the filing of the applications for registration; and (2) Plaintiff used the Registered  
4 and Pending Marks in commerce before Defendants used the Muzooka Mark. The Court  
5 addresses these grounds in turn.

6 First, Plaintiff asserts that priority of use is established by the date that the applications for  
7 the Registered and Pending Marks were filed: September 12, 2011. Opp. at 10; Compl. ¶¶ 16, 20.<sup>4</sup>  
8 When proving ownership of a mark, registration on the principal register in the PTO is “*prima  
facie* evidence . . . of the registrant’s ownership of the mark.” 15 U.S.C. § 1115(a); *see also  
Brookfield*, 174 F.3d at 1047. Therefore, once a mark is registered, the registrant is granted a  
10 rebuttable presumption of ownership dating back to the filing date of the ITU application for  
11 federal registration. *See Zobmondo Entm’t, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1111 n.3  
12 (9th Cir. 2010) (noting that the date an ITU application was filed “becomes the applicant’s  
13 constructive-use date”). “This gives the applicant priority of use over anyone who adopts the  
14 mark after the constructive-use date.” *Id.* (citing 15 U.S.C. § 1057(c)). Accordingly, Plaintiff  
15 claims September 12, 2011, the date that the ITU applications for the Registered and Pending  
16 Marks were filed, as the date of Plaintiff’s first use of the Registered and Pending Marks. Compl.  
17 ¶¶ 16, 20.  
18

19 Defendants first contend that Plaintiff cannot rely on the Registered Mark to demonstrate  
20 priority because Plaintiff is not the owner of the Registered Mark. Mot. at 5-6. The Court agrees.  
21 In the complaint, Plaintiff asserts that the Registered Mark was assigned to Plaintiff. Compl. ¶ 20;  
22

23  
24 <sup>4</sup> Although Plaintiff does not distinguish between Plaintiff’s common law trademark infringement  
25 and Lanham Act unfair competition claims, “[r]egistration under the Lanham Act has no effect on  
26 the registrant’s rights under the common law, which requires a mark to have been used in  
27 commerce before a protectable ownership interest in the mark arises.” *Dep’t of Parks &  
Recreation for State of Cal. v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1125-26 (9th Cir. 2006).  
28 Accordingly, the Court considers the impact of registration on priority of use only for Plaintiff’s  
Lanham Act unfair competition claim. By contrast, the Court considers below Plaintiff’s use of  
the Registered and Pending Marks in commerce to determine any priority of use for Plaintiff’s  
Lanham Act unfair competition and common law trademark infringement claims.

1 Opp. at 10. However, there is no assignment of the Registered Mark recorded with the PTO. *See*  
2 RJD Ex. B. Rather, an individual (Miller) is listed as the owner of the Registered Mark. *Id.*  
3 Plaintiff points to no other facts or authority supporting Plaintiff's ownership of the Registered  
4 Mark. Although this Court accepts the allegations in the complaint as true for the purposes of a  
5 motion to dismiss, *see Manzarek*, 519 F.3d at 1031, the Court need not accept as true allegations  
6 contradicted by judicially noticeable facts, *see Shwarz*, 234 F.3d at 435. Because judicially  
7 noticeable facts show that Plaintiff does not own the Registered Mark, Plaintiff cannot establish  
8 priority of use based on the Registered Mark. *See Shwarz*, 234 F.3d at 435.

9 Defendants next contend that Plaintiff cannot rely on the application for the Pending Mark  
10 to claim priority. Mot. at 6-7. Defendants do not dispute Plaintiff's ownership of the Pending  
11 Mark, but argue that Plaintiff cannot use the ITU application to establish priority because the  
12 Pending Mark is not registered. *Id.* Again, the Court agrees with Defendants. As discussed  
13 above, the filing date of an ITU application may be used as the constructive-use date of the mark,  
14 which provides priority of use over anyone who later adopts the mark. *See Zombondo Entm't,*  
15 *LLC*, 602 F.3d at 1111 n.3 (citing 15 U.S.C. § 1057(c)). However, this constructive-use date is  
16 established only once the mark is registered. *See id.; see also* 15 U.S.C. § 1057(c) ("*Contingent*  
17 *on the registration of a mark . . . the filing of the application to register such mark shall constitute*  
18 *constructive use of the mark, conferring a right of priority . . . (emphasis added); CreAgri, Inc. v.*  
19 *USANA Health Scis., Inc.*, 474 F.3d 626, n.7 (9th Cir. 2007) ("[A]s long as an applicant's mark is  
20 eventually granted registration on the principal register . . . the filing of an intent to use application  
21 constitutes 'constructive use of the mark, conferring a right of priority, nationwide in effect.'").  
22 The Pending Mark has not been registered. RJD Ex. A. Consequently, Plaintiff cannot claim  
23 priority rights from the date the ITU application for the Pending Mark was filed. *See Zombondo*  
24 *Entm't, LLC*, 602 F.3d at 1111 n.3.

25 Second, other than through registration, Plaintiff may claim priority of use by alleging that  
26 Plaintiff used "MUZOOK" in commerce before Defendants used the Muzooka Mark in  
27 commerce. *See Dep't of Parks & Recreation for State of Cal. v. Bazaar Del Mundo Inc.*, 448 F.3d  
28

1 1118, 1125-26 (9th Cir. 2006) (discussing use in commerce under California common law); *see*  
2 *also Sengoku Works Ltd.*, 96 F.3d at 1219 (discussing ownership under the Lanham Act and  
3 noting that “the party claiming ownership must have been the first to actually use the mark in the  
4 sale of goods or services”). Defendants argue that they began using the Muzooka Mark as early as  
5 December 2011, and Plaintiff has failed to show that Plaintiff used the Pending Mark before that  
6 date. Thus, Defendants say, Plaintiff has no protectable interest in a mark and cannot state a claim  
7 for common law trademark infringement or Lanham Act unfair competition.

8 The Court agrees with Defendants. Having reviewed the complaint, it is not clear when  
9 Plaintiff first began to use the Pending Mark in commerce. The complaint alleges only that  
10 Plaintiff has “for several years” engaged in promoting the production of creative works and  
11 developing the MuZook website. Compl. ¶ 12. Moreover, Plaintiff does not offer a first date of  
12 use in opposition to the motion to dismiss. *See generally* Opp. This is insufficient to show that  
13 Plaintiff used the Pending Mark in commerce before Defendants used the Muzooka Mark in  
14 December 2011. *See* ECF No. 46-1, Ex. D (Muzooka Mark record of registration, which indicates  
15 a first use in commerce of December 2011). Accordingly, Plaintiff has not alleged priority of use  
16 over Defendants.

17 In summary, Plaintiff cannot establish a protectable interest in the Registered Mark  
18 because Plaintiff is not the owner of the Registered Mark. Additionally, Plaintiff cannot establish  
19 a protectable interest in the Pending Mark because Plaintiff has failed to establish priority of use  
20 over Defendants, either through the application for the Pending Mark or the actual use in  
21 commerce of the Pending Mark. However, as Plaintiff could conceivably plead facts establishing  
22 prior use, the Court GRANTS Defendants’ motion to dismiss Plaintiff’s common law trademark  
23 infringement and Lanham Act claims with leave to amend. *See Lopez*, 203 F.3d at 1130 (district  
24 court should give leave to amend if the pleading can be cured by the allegation of other facts).

25 **b. Plaintiff’s State Unfair Competition Claim**

26 In addition to common law trademark infringement and Lanham Act unfair competition  
27 claims, Plaintiff asserts a claim for “unfair competition” under state law. Compl. ¶¶39-43. It is  
28

1 not clear from the face of the complaint whether Plaintiff intends to state a claim for common law  
2 or statutory unfair competition. *See* Cal. Civ. Code § 17200 (unfair competition); *Sybersound*  
3 *Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1153 (9th Cir. 2008) (discussing common law tort of  
4 unfair competition). The complaint does not identify the nature of this claim. *See* Compl. ¶¶39-  
5 43. Additionally, the relief requested does not help identify Plaintiff's claim, as Plaintiff seeks  
6 only an injunction under this claim. *See* *Duncan v. Stuetzle*, 76 F.3d 1480, 1489-90 (9th Cir.  
7 1996) (noting compensatory damages are available under the common law tort of unfair  
8 competition, but not the unfair competition statute (citing *Bank of the West v. Superior Court*, 2  
9 Cal. 4th 1254, 1265-66 (1992))).

10 The parties' briefs on the instant motion do not identify the nature of Plaintiff's unfair  
11 competition claim. Neither party indicates whether Plaintiff raises a common law or statutory  
12 claim, and neither party addresses this claim separately from the common law trademark  
13 infringement and Lanham Act unfair competition claims. Rather, Defendants argue generally that  
14 the complaint provides only conclusory allegations, Mot. at 5-7, while Plaintiff generally responds  
15 that the allegations are sufficient, Opp. at 5-10. Given that the Court cannot determine what claim  
16 Plaintiff alleges, Plaintiff has failed to "state a claim to relief that is plausible on its face." *See*  
17 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Accordingly, the Court GRANTS  
18 Defendants' motion to dismiss Plaintiff's unfair competition claim with leave to amend. *See*  
19 *Leadsinger, Inc.*, 512 F.3d at 532 (noting that a district court may grant leave to amend when  
20 amendment of the complaint could cure the identified deficiencies).

#### 21 IV. CONCLUSION

22 For the foregoing reasons, the Court rules as follows:

23

- 24 • The Court GRANTS Defendants' motion to dismiss all claims against Ivory  
Octaves with prejudice;
- 25 • The Court DENIES Defendants' motion to dismiss all claims against Wilson and  
Aldridge due to insufficient service of process, and ORDERS Plaintiff to serve  
26 Wilson and Aldridge within thirty (30) days of this Order;

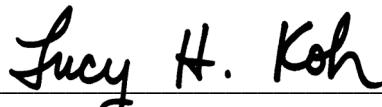
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1                   • The Court GRANTS Defendants' motion to dismiss all claims with leave to amend  
2                   to the extent that Plaintiff asserts that Defendants have secondary liability for  
3                   inducing acts of infringement, and otherwise DENIES Defendants' motion to  
4                   dismiss all claims for impermissibly lumping Defendants together; and  
5                   • The Court GRANTS Defendants' motion to dismiss all claims with leave to amend  
6                   on the grounds that Plaintiff has not stated a claim for relief.

7                   Should Plaintiff elect to file an amended complaint curing the deficiencies identified  
8                   herein, Plaintiff shall do so within thirty (30) days of the date of this Order. Failure to meet the  
9                   thirty-day deadline to file an amended complaint or failure to cure the deficiencies identified in  
10                   this Order will result in a dismissal with prejudice of Plaintiff's claims. Plaintiff may not add new  
11                   causes of action or parties without leave of the Court or stipulation of the parties pursuant to Rule  
12                   15 of the Federal Rules of Civil Procedure.

13 **IT IS SO ORDERED.**

14  
15 Dated: November 11, 2015

16   
17 LUCY H. KOH  
18 United States District Judge